No. 92-9049

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SUPREME COURT OF THE UNITED STATES

October Term 1993

ALFRED ARTHUR SANDOVAL,
Petitioner,
v.
PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

ON WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

BRIEF AMICUS CURIAE OF THE STATES OF MASSACHUSETTS, ALABAMA, IDAHO, INDIANA, MISSOURI, MONTANA, NEVADA, NORTH CAROLINA, OHIO, OREGON, PENNSYLVANIA, SOUTH CAROLINA, and TENNESSEE, IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

The amici states and commonwealths are vitally interested in this case, which challenges California's choice of how to define the government's burden of persuasion in criminal cases. While

every jury must, as a matter of due process, be properly instructed as to the quantum of proof necessary to convict, the manner in which that notion is conveyed to a jury widely varies among the states. So long as the instructions employed do not permit conviction on a lesser quantum of proof than is required by the Due Process Clause, the states should remain free to decide, if they elect to define the term "beyond a reasonable doubt" at all, how that concept should be explained to juries in their jurisdictions.

The California reasonable doubt instruction employed in this case contains precise language derived from Commonwealth v. Webster, 59 Mass. (5 Cush.) 295 (1850). The Webster formulation of the definition of proof beyond a reasonable doubt provides the

basis for instructions used and approved in a number of states for well over a century. The amici have a strong interest in preserving the time-honored definition and could suffer substantially were this Court to determine that it violates due process. While it is not possible to determine the precise number of criminal cases in which juries have been instructed by language similar to that in Sandoval and Webster, it is beyond question that the number is astronomical. For example, in Massachusetts, approximately six thousand individuals are arraigned for criminal charges each week, Aime v. Commonwealth, 414 Mass. 667, 683-684, 611 N.E.2d 204, 214 (1993), and there are over three thousand criminal jury trials each year in the District and

Superior Courts of the Commonwealth. Administrative Office of the Trial Court, Massachusetts Trial Court Interim Annual Report 19, 59 (1992) (1099 criminal jury trials in Superior Court during fiscal year 1992; 2042 criminal jury trials in District Court during calendar year 1992).

SUMMARY OF THE ARGUMENT

Amici demonstrate that California Jury Instruction 2.90 has its source and is grounded in specific language used and approved in the various states and by this Court for well over a century. An instruction which charges the jury that the government must convince them beyond a reasonable doubt of a defendant's guilt, and then informs them that this means that they have an abiding conviction, to a moral

certainty, of guilt, fully conveys the government's burden.

Invalidating any instruction for its mere mention of "moral certainty" in describing the degree of certainty of guilt necessary for conviction is both inappropriate and unwise. The states have, over the years, found different ways to define for their juries the quantum of proof required by the Due Process Clause. The right to continue to make those judgments should be honored.

Cage v. Louisiana does not require the California reasonable doubt instruction be invalidated. It does not contain the quantification of what doubt would be reasonable that was troublesome in Cage. And unlike the Cage instruction, which made but a general

reference to "moral certainty" as the degree of conviction the jurors should have, the California instruction clearly and directly informs that "an abiding conviction, to a moral certainty" of guilt can only be reached upon an evaluation of the evidence. There is no risk that the verdict in this case was based on subjective feelings or emotions apart from the evidence.

ARGUMENT

A DEFINITION OF THE GOVERNMENT'S PROOF IN A CRIMINAL CASE THAT REQUIRES THE JURY, AFTER FULL CONSIDERATION OF THE EVIDENCE, TO HAVE "AN ABIDING CONVICTION, TO A MORAL CERTAINTY" OF THE GUILT OF THE ACCUSED, SATISFIES THE REQUIREMENTS OF THE DUE PROCESS CLAUSE

California Jury Instruction (CJI) 2.90,[1/] like reasonable doubt

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1/ California Jury Instructions - Criminal, No. 2.90 provides:

(footnote continued)

instructions delivered in criminal cases in a number of states, informs the jury that the government's burden of persuasion beyond a reasonable doubt

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(footnote continued)

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] [her] guilt is satisfactorily shown, [he] [she] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] [her] guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

requires the minds of the jury to reach "an abiding conviction, to a moral certainty" of the guilt of the accused. Whether stated positively in terms of the certainty required for proof beyond a reasonable doubt, or described negatively as the state of mental conviction or belief which does not permit a reasonable doubt, the instruction adequately protects against convictions in violation of the Due Process Clause.

A. The Moral Certainty Formulation of Proof Beyond a Reasonable Doubt Has Longstanding and Extensive Approval in State Jurisprudence

The "abiding conviction, to a moral certainty" language in reasonable doubt instructions is generally said to have its source in the jury charge delivered

in Commonwealth v. Webster, 59 Mass. (5 Cush.) 295 (1850), by Chief Justice Shaw of the Massachusetts Supreme Judicial Court.[2/] See Apodaca v. Oregon, 406

2/ "Then, what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of

(footnote continued)

U.S. 404, 412 n.6 (1972).

Apart from Massachusetts, which continues to frame its reasonable doubt instructions in the Webster language, Commonwealth v. Dinkins, 415 Mass. 715, 724, 615 N.E.2d 570, 575 (1993), a number of other states have approved and encouraged the use of Webster's definition specifically, while others have adopted similar language that conveys the core of Webster's "moral certainty" formulation.

For example, in Donnelly v. State, 26 N.J.L. 601, 615 (1857), the New Jersey Supreme Court (Ogden, J.), reviewing a reasonable doubt

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(footnote continued)

those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt...." Commonwealth v. Webster, 59 Mass. (5 Cush.) at 320.

instruction, stated, "Upon a careful search of treatises and reports of trials, I have not found an answer more satisfactory to my mind, than that which was given by Ch. Just. Shaw, upon the trial of John C. Webster." The Court then quoted portions of the Webster charge, including the language that appears verbatim in the second paragraph of CJI 2.90. In 1866, the California Supreme Court itself, reviewing the trial court's charge on the subject of reasonable doubt, found that the instructions given were "substantially in the language of Mr. Chief Justice Shaw, in the case of the Commonwealth v. Webster, 5 Cush. 320, which is probably the most satisfactory definition ever given to the words 'reasonable doubt' in any case known to criminal

jurisprudence." People v. Strong, 30 Cal. 151, 155 (1866). See also Lanigan v. Maloney, 852 F.2d 40, 43 (1st Cir. 1988), cert. denied, 488 U.S. 1007 (1989) ("We find it hard to imagine, without recourse to prolixity, a charge more reflective of the solemn and vigorous standard intended.")

The Supreme Court of Ohio reached the same conclusion in 1891: "Perhaps no more satisfactory definition is to be found than that given by Chief Justice Shaw, in the Webster Case: 'It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.'" Morgan v. State,

48 Ohio St. 371, 377, 27 N.E. 710, 712 (1891).[3/]

In its definition of reasonable doubt, the Illinois Supreme Court in 1894 cited a number of authorities, including Webster, and concluded that proof beyond a reasonable doubt

> is proof "to a moral certainty," as distinguished from an absolute certainty. The two phrases, "proof beyond a reasonable doubt," and proof "to a moral certainty," are synonymous and equivalent. "Each signifies such proof as satisfies the judgment and conscience of the jury, as reasonable men, and applying

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3/ In the 1970's, when Ohio replaced the "abiding conviction to a moral certainty" test in its statutory definition of reasonable doubt with a "present firm conviction" standard, this change was generally considered to reduce the prosecution's burden, to the disadvantage of the accused. See State v. Crenshaw, 51 Ohio App. 2d 63, 366 N.E.2d 84, 85 (1977).

> their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible."

Carlton v. People, 150 Ill. 181, 192, 37 N.E. 244, 247 (1894), quoting Commonwealth v. Costley, 181 Mass. 1, 24 (1875).

Other courts, without referring to Webster, defined reasonable doubt in terms of moral certainty. In 1869, the Supreme Court of Indiana found it to be "such a certainty as would justify to the mind action, not only in matters of importance, but in those of the highest import, involving the dearest interests. Nothing short of this can serve as an example of that moral certainty which should alone authorize a

verdict of guilty." Bradley v. State, 31 Ind. 492, 505 (1869) (emphasis supplied). Similarly, the Georgia Supreme Court, after noting that "[t]he term 'moral certainty' is equivalent to the words 'beyond a reasonable doubt,'" approved of a jury instruction that conveyed the reasonable doubt charge in terms of moral certainty, finding that "as the judge charged that the defendants could not be found guilty until the evidence satisfied the jury of their guilt beyond a reasonable doubt, ... there was no error in further charging that they must be satisfied of their guilt to a reasonable and moral certainty." Bone v. State, 102 Ga. 387, 391, 30 S.E. 845, 847 (1897).

Many states continue to endorse the moral certainty formulation.

California, of course, does so in CJI 2.90, and Massachusetts insists that the government's burden be explained "in close reliance on the time-tested language." Commonwealth v. Ferreira, 373 Mass. 116, 130 n.12, 364 N.E.2d 1264, 1273 n.12 (1977). See, e.g., Commonwealth v. Beldotti, 409 Mass. 553, 562, 567 N.E.2d 1219, 1225 (1991). The Supreme Court of Indiana also recognizes the continuing vitality of the concept of moral certainty. Randolph v. State, 266 Ind. 179, 182-183, 361 N.E.2d 900, 902 (1977).

Idaho requires that jurors be charged in the language of CJI 2.90. The Idaho Supreme Court has held that "the only appropriate instruction on reasonable doubt is the California jury instruction," and that "[a]ny

embellishment or addition to the California reasonable doubt instruction risks misstating the law." State v. Rhoades, 121 Idaho 63, 82-83, 822 P.2d 960, 979-980 (1991), cert. denied, 113 S. Ct. 962 (1993). Recently, the same court reviewed a case in which the reasonable doubt instruction included the following language:

> If you have a reasonable doubt as to the guilt of the defendant, you must acquit him. But if, after going over in your minds the entire case, you have an abiding conviction, to a moral certainty, of the truth of the charge, then you are convinced beyond a reasonable doubt, and you should render your verdict accordingly.

State v. Hoffman, 123 Idaho 638, 851 P.2d 934, 939 n.3 (1993), petition for cert. filed, (U.S. Aug. 24, 1993) (No. 93-5784). The defendant challenged this instruction on due process grounds

"because it required the jury to base their verdict on a 'moral certainty.'" 123 Idaho 638, 851 P.2d at 939. The Court reaffirmed the California jury instruction, finding the challenged instruction was "substantially the same." Id.

The moral certainty formulation is also used in North Dakota's Pattern Jury Instruction on Reasonable Doubt, No. 2002, which states,

> It is that state of mind in which you do not feel an abiding conviction amounting to a moral certainty of the truth of the charge. . . . If, after careful deliberation, you are convinced to a moral certainty that the Defendant is guilty of the crime charged, then you are satisfied beyond a reasonable doubt.

City of Minot v. Rubbelke, 456 N.W.2d 511, 512 n.1 (N.D. 1990). The Supreme Court of North Dakota "strongly

recommend[s] adherence" to the pattern instruction: "[T]he pattern instruction serves as a model, that has withstood the test of time, for attorneys and judges on which to base their respective arguments and decisions." Id. at 515.

In a Tennessee case, after instructing the jury as to the presumption of innocence and the proof beyond a reasonable doubt standard, the trial judge told the jury, "Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required, and this certainty is required as to every proposition of proof requisite to constitute the offense." Marshall v. State, 528 S.W.2d 823, 824 (Tenn. Crim. App. 1975). The defendant argued that it was error for the trial judge to say

that each element must be proven to a moral certainty rather than beyond a reasonable doubt. Id. at 825. The Court disagreed, stating simply, "The use of this language on moral certainty is approved in Hardin v. State, 210 Tenn. 116, 122, 355 S.W.2d 105 [1962]." Id. Accord State v. Hallock, 1993 Tenn. Crim. App. Lexis 694, at *23 (Oct. 7, 1993).

The Rhode Island Supreme Court also approves of the moral certainty formulation. "[A] trial justice must instruct a jury that the prosecution is required to prove a defendant's guilt beyond a reasonable doubt. Proof beyond a reasonable doubt may be properly equated to proof of guilt to a moral certainty." State v. Desrosiers, 559 A.2d 641, 645 (R.I. 1989), citing

Commonwealth v. Wood, 380 Mass. 545, 547, 404 N.E.2d 1223, 1225-1226 (1980), and State v. Mantia, 101 R.I. 367, 223 A.2d 843 (1966). In the Mantia case, the Rhode Island Supreme Court quotes Webster to convey the "constituent elements" of reasonable doubt. Id. at 375, 223 A.2d at 848.

In 1980, a five-judge panel of the First Department of the Appellate Division of the Supreme Court of New York issued a per curiam opinion specifically to address numerous challenges to the "moral certainty" formulation:

> The correct and determinative standard is of course that guilt must be proved beyond a reasonable doubt. And in every case the trial court should explicitly charge that as the determinative standard, using the statutory phrase "beyond a reasonable doubt." CPL § 300.10 subd. 2. But

this does not mean that elaboration and semantic variations on this theme which do not reduce the standard are error . . . .

In particular, it is not error to equate the standard of proof of guilt beyond a reasonable doubt to proof "to a moral certainty." The phrase "to a moral certainty" has been used in this state by generations of trial judges. "Whether the expression used is 'beyond a reasonable doubt,' or 'to a moral certainty,' is immaterial; for they are synonymous, and each simply means that the proof must be such as would satisfy the judgment and consciences of the jurors that the crime charged had been committed by the defendant, and that no other reasonable conclusion was possible."

People v. Fox, 72 A.D.2d 146, 146-147, 423 N.Y.S.2d 171, 172 (1980) (citations omitted).

In a recent Alabama case, the Court of Criminal Appeals affirmed a reasonable doubt instruction that

contained references to moral certainty:

> When I say the State has the burden of proving guilt beyond a reasonable doubt and to a moral certainty, that does not mean that the State must prove the alleged crime beyond every imaginable or speculative doubt or beyond all possibility of mistake, because that would be impossible. A reasonable doubt means an actual substantial doubt. It could arise out of the testimony in the case or it could arise from a lack for which a reason can be assigned. And the expression "to a moral certainty" means practically the same thing as beyond a reasonable doubt, because if you are convinced to a point where you no longer have a reasonable doubt, then you are convinced to a moral certainty.

Stewart v. State, 601 So. 2d 491, 505 (Ala. Crim. App. 1992). Evaluating this instruction in light of the charge as a whole, the Court found that it "was thorough and did not mislead the jury." Id. at 505.

In State v. Morley, 239 Neb. 141, 474 N.W.2d 660 (1991), the Nebraska Supreme Court upheld an instruction that defined reasonable doubt as "such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused," id. at 154-155, 474 N.W.2d at 669-670, against a challenge that it lessened the state's burden of proof.[4/]

B. This Court Has Approved Moral Certainty Language As Properly Describing the Degree of Persuasion Necessary for Conviction

In a number of cases, this Court has also found that the "moral certainty"

4/ The identical instruction is at issue in Victor v. Nebraska, 242 Neb. 306, 494 N.W.2d 565, cert. granted, 114 S. Ct. 39 (1993) (No. 92-8894).

provision appropriately defines the concept of belief beyond a reasonable doubt, and has accepted that "[p]roof to a 'moral certainty' is an equivalent phrase with 'beyond a reasonable doubt.'" Fidelity Mutual Life Ass'n v. Mettler, 185 U.S. 308, 317 (1902), citing Commonwealth v. Costley, 118 Mass. at 24.

This Court has never held that an instruction explaining the concept of proof beyond a reasonable doubt in terms of abiding conviction, to a moral certainty, either reduces the quantum of proof necessary for conviction or invites the jury to decide the case on anything other than the evidence merely because it uses that language. In fact, in a number of cases the Court has rejected challenges to instructions

framed in the Sandoval-Webster language. Apart from demonstrating that proof beyond a reasonable doubt is constitutionally required in criminal cases, see In re Winship, 397 U.S. 358, 362 (1970), these cases show that the Court has never found an instruction to be flawed if it conveys that abiding conviction or moral certainty is the state of mind necessary to be reached, upon consideration of the evidence, to warrant a guilty verdict.

In Miles v. United States, 103 U.S. 304 (1881), the trial court had apparently charged in the language then used in Webster, and endorsed in five other states. While cautioning that "[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it clearer to the minds of the

jury," id. at 312, the Court indicated that the Webster language used in that case was "certainly very favorable to the accused, and sustained by respectable authority," id. That this Court has found it permissible merely to announce the standard of proof beyond a reasonable doubt, without further definition, see Dunbar v. United States, 156 U.S. 185, 199 (1895), does not mean that a definition such as used in Sandoval-Webster, which properly conveys the quantum of proof, is constitutionally impermissible.

Error in an instruction that a presumption of intent to defraud could only be overcome by sufficiently strong evidence that created a reasonable doubt of its correctness in Agnew v. United States, 165 U.S. 36, 50 (1897), was

neutralized because in other language the trial court had charged the jury that they could only convict if they were satisfied beyond a reasonable doubt that the defendant had the requisite intent. Id. at 51-52. In that case the trial judge used Sandoval-Webster language:

> By a reasonable doubt is not meant a possible doubt, but such doubt arising from the evidence that leaves the minds of the jury in such a state that they cannot say, after having reviewed all the evidence, that they have an abiding conviction, to a moral certainty, of the guilt of the accused.

Id. at 51. An objection to another instruction on reasonable doubt taken from Webster was summarily rejected as "that case has been cited with approval by this court." Perovich v. United States, 205 U.S. 86, 92 (1907).

Similarly, in Wilson v. United States, 232 U.S. 563 (1914), the defendants complained about the following instructions on reasonable doubt:

> [R]easonable doubt is that frame of mind which forbids you to say, all the evidence considered and weighed, "I have an abiding conviction of the defendants' guilt," or as it has been expressed, "I am convinced of the defendants' guilt to a moral certainty." If you can say that you have such a conviction, then you have no reasonable doubt, and your verdict should be guilty. On the contrary, if that is your frame of mind, if you are in the frame of mind where if it was a matter of importance to you in your own affairs, away from here, you would pause and hesitate, before acting, then you have a reasonable doubt.

Id. at 570. The defendant claimed this instruction was flawed because it never specifically stated that the government must prove its case beyond a reasonable

doubt, but the Court approved the instruction, as it "meant nothing less than that, and was sufficiently favorable to the defendants." Id.

In Hopt v. Utah, 120 U.S. 430 (1887), this Court recognized that the Massachusetts Supreme Judicial Court had found "to a reasonable and moral certainty" to be "synonymous and equivalent" with "beyond a reasonable doubt." Id. at 440. Agreeing that informing the jury that a defendant's guilt had to be proved beyond a reasonable doubt, without further explanation, would be sufficient in many cases, this Court specifically noted that in other cases, "some explanation or illustration of the rule may aid in its full and just comprehension." Id. Compare Commonwealth v. Stellberger, 25

Mass. App. Ct. 148, 515 N.E.2d 1207 (1987) (in a close case it is error to give no definition of beyond a reasonable doubt). Warning that some attempts at definition would not be appropriate, the Court found that the Utah court's reference to the certainty with which jurors would act in the important concerns of their own lives, was "as just a guide to practical men as well can be given." Hopt, 120 U.S. at 441.

Hopt supports the view that per se rules forbidding definition of the proof necessary for conviction, or condeming mention of moral certainty, are unwise, and reflects the Court's willingness to permit trial judges, or the various jurisdictions, to define the required degree of certainty as they deem

appropriate. See Medina v. California, 112 S. Ct. 2572, 2577 (1992). So long as a particular definition or formulation does not lessen the degree of proof mandated by due process, states should be given the flexibility to decide the best way to convey the concept. Addington v. Texas, 441 U.S. 418, 433 (1979). Some jurisdictions have determined that the prudent course is not to attempt definition, but, as has been seen, some have elected to retain long-standing approved language, while others have made individual judgments about the value of various parts of definitions approved elsewhere.[5/] Whatever choice is

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5/ For example, while many jurisdictions believe it appropriate to discuss reasonable doubt with the kind of doubt

(footnote continued)

made, individual reasonable doubt instructions will pass muster if there is no reasonable likelihood that the jury applied them in a way that lowered the government's burden of proof or permitted a verdict on other than the evidence. See Estelle v. McGuire, 112 S. Ct. 475, 482 (1991).

C. The California Jury Instruction on Reasonable Doubt Does Not Suffer From the Flaws Identified in Cage v. Louisiana

The only case in which this Court has indicated that "moral certainty" language may raise due process concerns

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(footnote continued)

that would make one hesitate to act, see Holland v. United States, 348 U.S. 121, 140 (1954), or to define it as doubt based on reason and common sense, Massachusetts disfavors both. Commonwealth v. Williams, 378 Mass. 217, 232-233, 391 N.E.2d 1202, 1212 (1979); Commonwealth v. Robinson, 382 Mass. 189, 197-198, 415 N.E.2d 805, 811 (1981).

is Cage v. Louisiana, 498 U.S. 39 (1990). In its per curiam opinion, this Court suggested two reasons why the instruction there was flawed. First, it equated reasonable doubt with "grave uncertainty" and "actual substantial doubt," terms which "suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." Id. at 41. Second, the error created by the use of these terms was compounded when "considered with the reference to 'moral certainty,' rather than evidentiary certainty." Id.[6/]

6/ In a footnote, this Court cited five cases as examples of "[s]imilar attempts to define reasonable doubt [that] have been widely criticized by the Federal Courts of Appeals." 498 U.S. at 41 n.*. Two of these cases found fault with "willingness to act" language, Monk v. Zelez, 901 F.2d 885, 890 (10th Cir. 1990); United States v. Moss, 756 F.2d

(footnote continued)

These faults are not present in the Sandoval-Webster instruction.

The chief deficiency of the instruction discussed in Cage is that it equated doubt with "grave uncertainty" and "actual substantial doubt," effectively reducing the quantum of proof that the prosecution must adduce to convict. Id. at 40-41. See Gaskins v. McKellar, 111 S. Ct. 2277 (1991) (opinion of Stevens, J., respecting the

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(footnote continued)

329, 333 (4th Cir. 1985); two criticized language equating reasonable doubt with "substantial doubt," Taylor v. Kentucky, 436 U.S. 478, 488 (1978); Monk, 756 F.2d at 889; one was concerned that jurors might base a conviction on their feelings rather than on the facts, United States v. Indorato, 628 F.2d 711, 720-721 (1st Cir.), cert. denied, 449 U.S. 1016 (1980); and one criticized defining reasonable doubt as "doubt to a moral certainty," a formulation which may have reversed the burden of proof, United States v. Byrd, 352 F.2d 570, 575 (2d Cir. 1965).

denial of the petition for certiorari).[7] Moral certainty as to guilt is different from grave uncertainty as to guilt. The first equates certainty with the state of mind necessary for conviction while the latter defines the amount of uncertainty needed for an acquittal. It is only the latter that can be construed to reduce the government's burden. In that case jurors could reasonably believe that unless their uncertainty was grave or substantial, they should convict. A

7/ It may be that "grave uncertainty" language is the most serious flaw in Cage. In Gaskins, the trial court had defined reasonable doubt as "a doubt for which you can give reason[,] [i]t is a substantial doubt." Gaskins v. McKellar, 916 F.2d 941, 952 (4th Cir. 1990), cert. denied, 111 S. Ct. 2277 (1991) (emphasis supplied). The charge did not contain "grave uncertainty" language that was in Cage. Gaskins v. McKellar, 111 S. Ct. at 2277 (opinion of Stevens, J.).

number of state courts construing Cage have sustained jury instructions with references to "moral certainty" but which did not have the "grave uncertainty" impediment. See, e.g., Stewart v. State, 601 So. 2d 491, 504-505 (Ala. Crim. App. 1992); Bradford v. State, 261 Ga. 833, 835, 412 S.E.2d 534, 536 (1992); State v. Hoffman, 123 Idaho 638, 851 P.2d at 939; State v. Morley, 239 Neb. at 155, 474 N.W.2d at 670; State v. Williams, 313 Or. 19, 40-42, 828 P.2d 1006, 1020-1021, cert. denied, 113 S. Ct. 171 (1992). The Sandoval-Webster reasonable doubt instruction does not equate reasonable doubt with "grave uncertainty." Nor does it make use of the "actual substantial doubt" formulation criticized in Cage.

California Jury Instruction 2.90 states, in part, that reasonable doubt

> is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

(emphasis supplied). The reference to "moral certainty" clearly describes a state of mind reached "after the entire comparison and consideration of all the evidence."

This juxtaposition is in stark contrast to the Cage instruction, which defined reasonable doubt as "such doubt as would give rise to a grave uncertainty," as "an actual substantial doubt," and concluded with, "What is required is not an absolute or mathematical certainty, but a moral

certainty." Cage, 498 U.S. at 40. It is only when the condemned "grave uncertainty" and "actual substantial doubt" are considered with the general reference to moral certainty as opposed to moral certainty reached upon consideration of the evidence, that a reasonable jury could interpret the instruction to allow a conviction based on a degree of proof below the constitutional requirement. Id. at 41. In fact, the moral certainty phrase in Cage could have led a jury to conclude that they needed to reach moral certainty of doubt in order to acquit.

Because the reasonable doubt standard contemplates a "subjective state of certitude," In re Winship, 397 U.S. at 364, reached by jurors who "are able upon their consciences, to say that

the evidence before them ... is sufficient," id. at 363, quoting Davis v. United States, 160 U.S. 469, 493 (1895), it is not the use of "moral certainty" that was troublesome in Cage, but the absence of any indication of what the jury could rely upon to reach that mental state. Compare United States v. Drake, 673 F.2d 15, 21 (1st Cir. 1982), citing United States v. Indorato, 628 F.2d 711, 721 n.8 (1st Cir. 1980); Morley v. Stenberg, 828 F. Supp. 1413, 1421 (D. Neb. 1993); State v. Bryant, 334 N.C. 333, 343, 432 S.E.2d 291, 297 (N.C. 1993), petition for cert. filed, 62 U.S.L.W. 3360 (U.S. Nov. 12, 1993) (No. 93-753).[8/]

8/ Until the Bryant decision in 1993, the Supreme Court of North Carolina had specifically endorsed the "moral certainty" language from Webster. See State v. Hammond, 241 N.C. 226, 232, 85 S.E.2d 133, 138 (1954).

As defendants are entitled to have their cases decided solely on the evidence, Taylor v. Kentucky, 436 U.S. 478, 485 (1978), the infirmity in Cage is nothing more than the fact that the term "moral certainty," coupled with inaccurate synonyms for reasonable doubt, appears without reference to the evidence. By contrast, in the Sandoval-Webster formulation, "moral certainty" describes the jurors' degree of conviction "after the entire comparison and consideration of all the evidence." See Bell v. State, 610 N.E.2d 229, 235 (Ind. 1993) ("The wording, unlike that in Cage, bases the doubt in terms of consideration of the evidence.")

In the end, CJI 2.90, in four short sentences, conveys all that is

constitutionally required for proof of conviction, granting the defendant the full protection to which he is entitled by the Due Process Clause:

a) he is presumed innocent until the contrary is proved;

b) the people have the burden of proving him guilty beyond a reasonable doubt;

c) reasonable doubt is not mere possible or imaginary doubt;

d) reasonable doubt exists as a result of the state of the case;

e) after considering the evidence, the jury must have an abiding conviction, to a moral certainty, of guilt;

f) if they do not have that abiding conviction, reasonable doubt exists;

g) if there is a reasonable doubt as to his guilt, the defendant must be acquitted.

CONCLUSION

For all the above reasons, the judgment of the California Supreme Court upholding the constitutionality of California Jury Instruction 2.90 should be affirmed.

Respectfully submitted,

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